

Report on SEC Whistleblower Office Discusses Focus on Restrictive Severance and Confidentiality Agreements

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The [SEC's 2016 report](#) to Congress on its whistleblower program announced that it paid out \$57 million in fiscal 2016, more than the total amount awarded during the entire first five years of the program. Since its inception, 35 whistleblowers have received more than \$130 million by helping originate or contribute to enforcement actions that resulted in \$584 million in financial sanctions. The number of tips have increased yearly, with more than 4,000 in fiscal 2016.

One section of the report describes the four actions that the Commission took this year related to severance agreements, two of which we previously discussed [here](#). The SEC charged those four companies with violating Rule 21F-17(a), hindering communications with the staff. The rule prohibits any person from taking action that impedes individuals from communicating directly with the staff about a possible securities law violation, "including enforcing, or threatening to enforce, a confidentiality agreement related to those communications."

In each case, the SEC found that the agreements with employees were unduly restrictive, even though only one situation effected an ongoing whistleblower communication. The staff determined that the use of a standard template that prohibited employees from disclosing a company's confidential information or trade secrets except pursuant to formal legal processes or with the written approval of authorized company representatives, or that limited the type of information that could be conveyed, needed to be changed. The agreements were revised to make clear that they do not in any way prohibit employees from voluntarily communicating with the SEC regarding suspected violations of law.

Other actions focused on severance agreements that required departing employees to waive their ability to obtain awards from the SEC's whistleblower program as a condition to receiving severance, or otherwise waived awards obtained based on proceedings brought about by communicating with regulators. In the only case that involved an actual whistleblower, an employee who had been communicating with the SEC stopped doing so after entering into a separation agreement that included strict confidentiality provisions. Several of the companies involved in these cases agreed to contact former employees as part of their settlements.

According to the report, accessing confidentiality, severance, and other kinds of agreements that may "stifle a would-be whistleblower" will continue to be a top priority for the SEC's Office of the Whistleblower. Some, however, including the former head of the SEC office, [have questioned](#) whether the forthcoming changes in the composition of the Commission may lead to less focus on these types of actions.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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